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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

REPUBLICAN NATIONAL COMMITTEE, et al.,

Plaintiffs,

v.

CARI-ANN BURGESS, et al.,

Defendants.

No. 3:24-cv-198-MMD-CLB

**RESPONSE IN
OPPOSITION TO
SECRETARY'S MOTION
TO DISMISS**

1 Plaintiffs—the Republican National Committee, the Nevada Republican Party,
2 Donald J. Trump for President 2024, Inc., and Donald J. Szymanski—file this
3 response in opposition to the Secretary of State’s motion to dismiss. *See* Sec’y Mot.
4 (Doc. 60) (joined by county defendants, Docs. 61, 63). For the reasons discussed in this
5 response, the Court should deny the motion.

6 INTRODUCTION

7 When it comes to elections, timing is everything. Deadlines govern when
8 politicians announce their candidacy, when campaigns contact voters, and when
9 states print ballots—just to name a few. Deadlines dictate the actions of parties,
10 candidates, voters, and the government. And the day of the election looms over all
11 other deadlines. Parties and candidates organize their electoral efforts around that
12 day, devoting their time and resources around “election day.”

13 Nearly two centuries ago, Congress determined that federal elections would
14 take place on “the Tuesday next after the first Monday in November” of every even-
15 numbered year. *See* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721. States must abide by that
16 decree, which prohibits States from consummating an election prior to election day.
17 *Foster v. Love*, 522 U.S. 67, 70 (1997). This deadline provides clear notice, helps
18 prevent fraud, and quells the suspicions of impropriety that can ensue when ballots
19 flow in after election day and potentially flip the results. Nevertheless, Nevada
20 permits ballots that come in after election day to be counted. So long as a mail-in ballot
21 is postmarked by election day and received within four business days after election
22 day, Nevada law requires county election officials to count it. Nev. Rev. Stat.
23 §293.269921(1)(b). And it goes a step further: election officials must *presume* that
24 ballots received up to three days after Election Day “have been postmarked on or
25 before the day of the election” if the date of the postmark is indeterminate. *Id.*
26 §293.269921(2). By effectively extending Nevada’s federal election past election day,
27 Nevada violates federal law mandating that elections take place on the uniform,
28 national “day for the election.”

BACKGROUND

For nearly all of its history, Nevada required mail-in ballots to be returned before election day. That changed in 2019. The Nevada Legislature passed a law requiring absentee ballots to be counted if they are postmarked on or before election day and received up to seven days after election day. *See* A.B. 345, §§45, 48, 80th Sess. Nev. Legis. (2019), perma.cc/WN2J-25YL. The law also provided that absentee ballots received up to three days after the day of the election “shall be deemed to have been postmarked on or before the day of the election” if “the date of the postmark cannot be determined.” *Id.* §45(2). In 2020, the Legislature amended the law to apply to all “mail ballot[s]” during an “emergency or disaster” declared by the Legislature. A.B. 4, §§2, 20, 37, 32d Spec. Sess. Nev. Legis. (2020), perma.cc/5SGV-KJPC. In 2021, the Legislature amended the law again. The law now requires election officials to count mail ballots if they are postmarked by election day and received up to four days after Election Day. Nev. Rev. Stat. §293.269921(1)(b). Ballots for which “the date of the postmark cannot be determined” are “deemed” timely if received within three days after election day. *Id.* §293.269921(2). And these rules apply to all mail ballots regardless of whether there is an emergency.

The Republican National Committee (RNC), Nevada Republican Party (NVGOP), Donald J. Trump for President 2024, Inc., and Donald J. Szymanski filed this lawsuit to enjoin Nevada’s violation of federal law. *See* Compl. (Doc. 1) at 9-20. They represent their own interests in participating in fair elections, running effective campaigns, and preserving their resources. And they represent the interests of voters and candidates in lawful elections that protect the right to vote and run for office. They filed this suit against Defendants, all of whom bear some level of responsibility in enforcing Nevada’s mail-ballot deadline at the state and county levels.

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) “tests” whether the complaint satisfies Rule 8. *Thomson v. Caesars Holdings Inc.*, 661 F. Supp. 3d 1043, 1052 (D. Nev. 2023).

Rule 8 in turn requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Courts must accept the factual allegations as true, allow all reasonable inferences from those allegations, and construe the complaint in the light most favorable to the plaintiff. *Edwards v. Signify Health, Inc.*, 2023 WL 3467558, at *2 (D. Nev. May 12, 2023). After drawing all those inferences in Plaintiffs’ favor, the question is whether the complaint states a claim that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausible means a “reasonable inference that the defendant is liable.” *Id.* It does not mean that liability is “probable,” *id.*, or even that Plaintiffs are “likely to succeed,” *Produce Pay, Inc. v. Izguerra Produce, Inc.*, 39 F.4th 1158, 1166 (9th Cir. 2022).

The same rules apply to the Rule 12(b)(1) motion. “When ‘standing is challenged on the basis of the pleadings,’” the Court “must ‘accept as true all material allegations of the complaint’ and ‘construe the complaint in favor of the complaining party.’” *Cal. Rest. Ass’n v. City of Berkeley*, 89 F.4th 1094, 1100 (9th Cir. 2024) (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988)). At this stage, “general factual allegations of injury resulting from the defendant’s conduct may suffice,” because courts must “presume that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up).

ARGUMENT

I. Plaintiffs are not precluded by a different lawsuit over a different law that involved different parties with different bases for standing.

Issue preclusion applies only when “(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits.” *Love v. Villacana*, 73 F.4th 751, 754 (9th Cir. 2023) (citation omitted). Issue preclusion “must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain

unchanged.” *Comm’r v. Sunnen*, 333 U.S. 591, 599-600 (1948). And the party asserting issue preclusion bears the burden to show that the precluded issue “is identical to an issue litigated in a previous action.” *Steen v. John Hancock Mut. Life Ins.*, 106 F.3d 904, 912 (9th Cir. 1997) (citation omitted). “[I]f there is any doubt as to whether an issue was actually litigated in a prior proceeding,” issue preclusion “is inappropriate.” *Eureka Fed. Sav. & Loan Ass’n v. Am. Casualty Co. of Reading*, 873 F.2d 229, 233 (9th Cir.1989). The Secretary argues that this Court’s decision on standing in *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993 (D. Nev. 2020), precludes Plaintiffs from bringing this case. See Sec’y Mot. 7-8. But issue preclusion doesn’t apply for at least two reasons.

First, the “issue” of whether Plaintiffs have standing to challenge a new law is not “identical” between this case and *Cegavske*. *Love*, 73 F.4th at 754. The judgment in *Cegavske* was that the RNC, NVGOP, and 2020 Trump Campaign lacked standing to “challenge several key provisions of AB 4,” including the emergency seven-day mail-ballot deadline. 488 F. Supp. 3d at 996. The law has since changed. The legislature amended the deadline from seven days to four days. Nev. Rev. Stat. §293.269921(1)(b). And it changed the conditions under which the deadline applies—now, the law is a permanent fixture of Nevada elections, regardless of whether the legislature declares an emergency. A.B. 4, §§2, 20, 37. “When a different rule of law applies, the issue is not ‘identical’ and [issue preclusion] is not available.” *Sw. Pet Prod., Inc. v. Koch Indus., Inc.*, 32 F. App’x 213, 215 (9th Cir. 2002) (citing *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9th Cir. 1971)). The Secretary thus has not carried his burden to show that the issues are “identical.” *Steen*, 106 F.3d at 912. Indeed, the Secretary admits that the two statutes are “nearly identical,” Sec’y Mot. 22, not “identical.”

Concerns about a second bite at the apple do not apply when there’s a second apple. The Secretary argues that the issue of “standing” is the same between the two cases. Sec’y Mot. 8. But if courts framed the issue that broadly, a plaintiff who lost a

1 suit against a state official based on standing would be permanently barred from ever
2 suing a government official again, for any legal violation. The court in *Cegavske* did
3 not hold that the plaintiffs lacked standing to sue the Secretary, or that they don't
4 suffer harm from any election law, or that they aren't injured by any election-day
5 deadline. It held only that the plaintiffs were not injured by the "provisions of AB 4"
6 that they challenged. *Cegavske*, 488 F. Supp. 3d at 996. Anything broader would have
7 been an unconstitutional advisory opinion and thus not "necessary to decide the
8 merits." *Love*, 73 F.4th at 754. Said differently, "issue preclusion does not apply" even
9 to issues that "could have been raised, but were not." *Janjua v. Neufeld*, 933 F.3d
10 1061, 1065 (9th Cir. 2019). And the standing of Plaintiffs to challenge *this law*—
11 enacted in 2021—could not have been raised in a case decided in 2020.

12 Courts even decline to apply issue preclusion when there is "an intervening
13 change in the governing law." *Artukovic v. INS*, 693 F.2d 894, 898 (9th Cir. 1982).
14 That doctrine usually appears when a judicial decision changes the "legal climate,"
15 which can be a difficult line to draw. *Sunnen*, 333 U.S. at 606. Here, the line is clear:
16 the legislature changed the very law that Plaintiffs challenge. The Secretary cites no
17 case in which a party was precluded from challenging a law that has been changed
18 since the prior lawsuit. The standing issues are thus not "identical in all respects," so
19 preclusion doesn't apply. *Id.* at 599. Plaintiffs are no more bound by the *Cegavske*
20 judgment than Defendants are bound to enforce the now-repealed version of the law.

21 **Second**, even if issue preclusion applied to the RNC and NVGOP, it wouldn't
22 apply to the other two plaintiffs in this case who were not parties to *Cegavske*. The
23 Secretary all but admits that preclusion doesn't apply to Mr. Szymanski, which is
24 reason enough to proceed to the merits. And the 2024 Trump Campaign didn't even
25 exist when *Cegavske* was litigated. The 2024 campaign and the 2020 campaign are
26 two different entities with separate FEC filings running different campaigns in
27 different election cycles. See *Donald J. Trump For President 2024 Statement of*
28 *Organization*, Fed. Election Comm. (Nov. 2022), perma.cc/NLE3-LKF5. And none of

the traditional privity rules apply. *See In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (“First, a non-party who has succeeded to a party’s interest in property is bound by any prior judgment against the party. Second, a non-party who controlled the original suit will be bound by the resulting judgment. Third, federal courts will bind a non-party whose interests were represented adequately by a party in the original suit.”). Issue preclusion does not apply.

II. Plaintiffs have plausibly alleged several bases for standing.

Standing requires injury, causation, and redressability. Because all Plaintiffs here seek the same relief under the same claim, “the Article III injury requirement is met if only one plaintiff has suffered concrete harm.” *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020). Plaintiffs have standing under a variety of theories, any one of which is sufficient to deny Defendants’ motions.

A. Political parties are injured by laws that force them to divert money from other activities critical to their mission.

The simplest case for standing is Plaintiffs’ monetary expenditures caused by the law they challenge. Resource diversion is frequently the basis for standing in election-law cases. *E.g.*, *Brnovich v. DNC*, 141 S. Ct. 2321 (2021) (Democratic Party had standing to challenge ballot-counting and ballot-collection laws); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1266 (N.D. Ga. 2019) (the “need to divert resources from general voting initiatives or other missions of the organization” establishes standing “[i]n election law cases”); *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (collecting cases). The complaint alleges that counting ballots received days after the election forces the organizational plaintiffs to spend money on a variety of election activities that they would otherwise spend on other mission-critical activities. Compl. ¶¶14-19, 48-49, 74. “[T]here can be no question” that diversions of resources are an “injury in fact.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Even a “broadly alleged” diversion-of-resources injury is sufficient “at the

pleading stage.” *La Raza*, 800 F.3d at 1041 (quoting *Havens*, 455 U.S. at 379). But the complaint includes specifics. By accepting ballots after election day, Nevada prolongs the feasible time for voters to return their ballots via mail, which forces political parties to divert money to absentee ballot-chase programs through election day. Compl. ¶14. Failing to spend that money harms the RNC and NVGOP’s mission to “elect Republican candidates to state and federal office” and harms the Trump Campaign’s mission to reelect President Trump. ¶¶12, 15, 19. And the organizational Plaintiffs are able to “maintain mail-ballot-specific get-out-the-vote operations” through Election Day only by “divert[ing] resources from in-person Election Day get-out-the-vote activities.” ¶49. Because these “are resources they would have spent on some other aspect of their organizational purpose” that “advances their goals,” the organizational Plaintiffs have plausibly alleged an injury in fact. *La Raza*, 800 F.3d at 1040.

The post-election deadline also forces the organizational Plaintiffs to spend time and money observing additional post-election-day ballot processing and counting. Nevada law guarantees Plaintiffs the right to be represented on county mail ballot central counting boards. Nev. Rev. Stat. §293.269929(2). It also guarantees the right to observe the handling and counting of mail ballots. *Id.* §293.269931(1); Nev. Admin. Code §§293.322(3)-(4), .356(1). Extending the days for which mail ballots will be received and counted “requires Plaintiffs and their members to divert more time and money to post-election mail ballot activities.” Compl. ¶48.

The Secretary points out that Nevada allows seven days for counting ballots, regardless of when ballots are received. Sec’y Mot. 9-10. But that misunderstands the injury. The post-election deadline requires election officials to determine the time of receipt and the date of the postmark, and to make judgment calls if “the date of the postmark cannot be determined.” Nev. Rev. Stat. §293.269921. It is *that fact* that requires additional training, preparation, and volunteer time, all of which “divert[] resources from in-person Election Day get-out-the-vote activities.” Compl. ¶49. In

1 other words, the *rules* for ballot-counting matter just as much as the *time* for ballot
 2 counting when it comes to political parties allocating resources for poll-watching. And
 3 the resource-diversion doctrine does not permit the Court “to second-guess a
 4 candidate’s reasonable assessment of his own campaign.” *Becker v. FEC*, 230 F.3d 381,
 5 387 (1st Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*
 6 *Inc.*, 528 U.S. 167 (2000)). The seven-day ballot-counting deadline is irrelevant to
 7 Plaintiffs’ standing.

8 The Secretary’s inapplicable cases don’t rebut these principles. First, the
 9 Secretary tried to dismiss these injuries as mere “budgetary choices.” Sec’y Mot. 9
 10 (quoting *United Poultry Concerns v. Chabad of Irvine*, 743 F. App’x 130, 131 (9th Cir.
 11 2018)). But the quoted case held that a nonprofit did not have standing based on
 12 resources devoted to investigating *someone else’s* potential legal violations. *United*
 13 *Poultry Concerns*, 743 F. App’x at 131. Whether investigated or not, the violations
 14 themselves did not injure the plaintiffs. *Id.* That’s not the case here—the Plaintiffs
 15 allege that the post-election deadline forces them to spend money on “mail-ballot-
 16 specific get-out-the-vote operations” instead of “in-person Election Day get-out-the-
 17 vote activities.” Compl. ¶49. And if Plaintiffs “had not diverted resources to
 18 counteracting the problem” of late-arriving ballots, they “would have suffered some
 19 other injury” to their electoral interests by neglecting mail-in voter turnout. *La*
 20 *Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088
 21 (9th Cir. 2010). In other words, the Plaintiffs must choose between prioritizing in-
 22 person turnout or mail-in turnout on election day. They cannot “avoid suffering one
 23 injury or the other, and therefore [have] standing to sue.” *Id.*

24 The Secretary cites two election cases that addressed different standing
 25 theories than those presented here. Both cases dismissed allegations that diversion of
 26 resources was necessary to educate voters to combat confusion and discouragement
 27 from a change in the law. *See Donald J. Trump for President, Inc. v. Way*, 2020 WL
 28 6204477, at *8 (D.N.J. Oct. 22, 2020); *Donald J. Trump for President, Inc. v. Boockvar*,

1 493 F. Supp. 3d 331, 380 (W.D. Pa. 2020). And the New Jersey case ruled that
 2 diverting resources for canvassing to address COVID-era problems did not support
 3 standing because they were “not geared toward identifying or counteracting injuries
 4 arising from the challenged conduct.” *Id.* at *10. Neither case is relevant to the conduct
 5 here. The Plaintiffs are not diverting their resources based on a law’s hypothetical
 6 effects on voter confusion and turnout. They are diverting resources to combat the
 7 law’s *actual effect* of extending the time for voters to return ballots. That effect formed
 8 the basis of the intervenors’ resource-diversion interests in this case. *See* Order
 9 Granting Interv. (Doc. 70) at 4 (“The link between an earlier mail ballot receipt
 10 deadline and Petitioners’ financial interests is thus clear and direct.”).

11 Courts across the country have found standing in situations like this one. The
 12 Democratic Party had standing to challenge ballot-counting procedures because it
 13 would have to “retool [its] [get-out-the-vote] strategies and divert more resources to
 14 ensure that low-efficacy voters are returning their early mail ballots.” *DNC v. Reagan*,
 15 329 F. Supp. 3d 824, 841 (D. Ariz. 2018), *rev’d and remanded sub nom. on other*
 16 *grounds, Brnovich*, 141 S. Ct. 2321. The Texas Democratic Party had standing to
 17 challenge the removal of a *Republican* candidate from the ballot because the removal
 18 would have required the Democrats to revise their campaign against a new opponent.
 19 *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006). “[M]ultiple courts
 20 have held” that the Democratic Congressional Campaign Committee had standing to
 21 challenge laws that cause it to “divert resources away from engaging and mobilizing
 22 voters.” *Democratic Cong. Campaign Comm. v. Kosinski*, 614 F. Supp. 3d 20, 45
 23 (S.D.N.Y. 2022) (collecting cases). These cases are legion.¹ In these circumstances,
 24 courts “have no difficulty concluding that Plaintiffs have adequately alleged that the

25
 26 ¹ *E.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1335 (N.D. Ga. 2018); *Harding v. Edwards*, 484 F. Supp.
 27 3d 299, 315 (M.D. La. 2020) (finding standing when organizations’ missions were “rendered more
 28 onerous” by the challenged law); *La Union del Pueblo Entero v. Abbott*, 618 F. Supp. 3d 504, 549-52
 (W.D. Tex. 2022); *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1177-85 (N.D. Ga.
 2022); *Ark. United v. Thurston*, 626 F. Supp. 3d 1064, 1080-81 (W.D. Ark. 2022); *New Ga. Project v.*
Raffensperger, 484 F. Supp. 3d 1265, 1286 (N.D. Ga. 2020).

injury they suffer is attributable to the State.” *La Raza*, 800 F.3d at 1041.

Just today, the Supreme Court confirmed this understanding. The Court explained that an organization did not have standing merely because it would “expend[] money to gather information and advocate against a defendant’s action.” *FDA v. All. for Hippocratic Medicine*, No. 23-235, slip op. 22. But the Court contrasted that situation with one where the challenged action “directly affected and interfered with” the “core business activities” of an “issue-advocacy organization.” *Id.* Thus, *Alliance for Hippocratic Medicine* illustrates that the organizational Plaintiffs are injured by a diversion of resources to address a post-election deadline that directly interferes with their core goals of electing their candidates.

B. The post-election receipt deadline imposes competitive injuries on Republican candidates.

“A second basis for the [political party’s] direct standing is harm to its election prospects.” *Tex. Democratic Party*, 459 F.3d at 586. The RNC, NVGOP, and the Trump Campaign are Republican organizations that represent Republican candidates in upcoming Nevada elections. Compl. ¶¶12, 15, 19. They have standing in their own right and on behalf of their members whose electoral chances are injured by the post-election deadline.² The complaint alleges that the post-election deadline favors Democrats in Nevada, whose voters disproportionately vote by mail. ¶¶56-59. The Democratic National Committee, at least, recognizes these competitive injuries. *See* DNC Mot. to Interv. 10 (“Interference with a political party’s electoral prospects constitutes a particularized interest.”). That’s unsurprising, as the Ninth Circuit just recently held that “the DNC, as the operational arm of the Democratic Party” had standing to challenge Arizona’s facially neutral ballot-order statute because the law

² Associational standing has three requirements, and the Secretary challenges only one: whether a member would have standing to sue in their own right. *See Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). The Secretary does not contest the other two requirements probably because they are easily satisfied here. This suit is at the core of the organizational Plaintiffs’ mission and member participation is not necessary because Plaintiffs seek only injunctive and declaratory relief. *See, e.g., Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004).

1 resulted in a marginal benefit “to their rival candidates.” *Mecinas v. Hobbs*, 30 F.4th
2 890, 898 (9th Cir. 2022).

3 The “principle” of competitive electoral harms “is neither novel nor unique to
4 the realm of the electoral.” *Id.* “[C]andidates ... have a cognizable interest in ensuring
5 that the final vote tally accurately reflects the legally valid votes cast. An inaccurate
6 vote tally is a concrete and particularized injury to candidates such as the Electors.”
7 *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). When election rules “illegally
8 structure a competitive environment ... parties defending concrete interests (e.g.,
9 retention of elected office) in that environment suffer legal harm under Article III.”
10 *Shays v. FEC*, 414 F.3d 76, 82 (D.C. Cir. 2005) (upholding standing of congressional
11 candidates “waging reelection contests governed by” the challenged law).
12 “Voluminous” authority shows that candidates and parties suffer injury when their
13 “chances of victory would be reduced.” *Tex. Democratic Party*, 459 F.3d at 587 & n.4
14 (collecting cases).

15 Political parties have competitive standing regardless of whether the post-
16 election deadline actually favors one party over another. Republican candidates “are
17 at the very least harmed by having to anticipate other actors taking advantage of the
18 regulations to engage in activities that otherwise would be barred.” *Shays*, 414 F.3d
19 at 87. As the DNC has argued in this case, courts have “found qualifying interests
20 where a lawsuit threatens to interfere with a political party’s electoral prospects.”
21 DNC Mot. to Interv. 7 (citing *Owen*, 640 F.2d at 1132). That is because ballot-receipt
22 deadlines, like most election rules, “necessarily affect the way these politicians will
23 run their campaigns.” *Shays*, 414 F.3d at 87 (cleaned up). It is thus sufficient that the
24 post-election deadline forces both parties to work “to prevent their opponent from
25 gaining an unfair advantage in the election process.” *Owen v. Mulligan*, 640 F.2d
26 1130, 1133 (9th Cir. 1981).

27 In any event, the complaint raises at least two inferences of harm to Republican
28 candidates. First, rules that favor mail-in voting necessarily benefit Democrats, whose

1 voters overwhelmingly tend to vote by mail. The MIT Election Lab reported that “46%
2 of Democratic voters in the 2022 General Election mailed in their ballots, compared
3 to only 27% of Republicans.” Compl. ¶56. Nevada is even more polarized. The
4 Secretary’s own data shows that in Nevada’s 2020 general election, 60.3% of
5 Democratic voters voted by mail, compared to just 36.9% of Republican voters. ¶57
6 (citing *See Nev. Sec’y of State, 2020 General Election Turnout*). And in the 2022
7 general election, 61.3% of Democrats and just 40% of Republicans voted by mail in
8 Nevada. *Id.* The Secretary disputes the inferences drawn from those facts. Sec’y Mot.
9 13-14. But those inferences must be drawn in Plaintiffs’ favor. *Iqbal*, 556 U.S. at 678.
10 The Secretary also introduces *other evidence* that allegedly shows that “the gap
11 between Republican and Democratic voters voting by mail has been narrowing
12 significantly over time.” Sec’y Mot. 13. But courts cannot take “judicial notice of
13 disputed facts,” *id.*, or use outside materials to contradict the factual allegations or
14 inferences in the complaint. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1003,
15 1014 (9th Cir. 2018). An outside document that “merely creates a defense to the well-
16 pled allegations in the complaint” cannot “defeat otherwise cognizable claims.” *Id.*

17 Plaintiffs also allege that late ballots in particular tend to favor Democrats,
18 whose voters tend to mail their ballots later than Republicans. Compl. ¶58. And in the
19 primary elections from this election cycle, Democrats disproportionately voted by mail
20 compared to Republicans *and* Democrats had significantly more mail ballots rejected
21 for not being returned correctly. ¶59. The Secretary’s only argument is that the
22 Plaintiffs “cite nothing” indicating that late-arriving mail-in ballots tend to favor
23 Democrats. Sec’y Mot. 14. But Plaintiffs’ burden at the pleading stage is to “allege
24 facts,” not cite them. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007). In any
25 event, they have cited sources—many from the Secretary’s own reports—indicating
26 that Democratic voters tend to vote by mail and vote late. Taking the allegations as
27 true, the complaint shows that the “allegedly unlawful election regulation makes the
28 competitive landscape worse for a candidate or that candidate’s party than it would

1 otherwise be if the regulation were declared unlawful.” *Mecinas*, 30 F.4th at 898.

2 The Secretary next argues that Plaintiffs must allege facts “suggesting that
3 late-arriving mail ballots could change the results of an election.” Sec’y Mot. 14-15.
4 Not so. Plaintiffs are seeking “forward-looking” relief, so Article III allows them to sue
5 over the “risk of harm,” not just actual harm. *TransUnion LLC v. Ramirez*, 594 U.S.
6 413, 435 (2021). And “[b]ecause a head-to-head election has a single victor, any benefit
7 conferred on one candidate is the effective equivalent of a penalty imposed on all other
8 aspirants for the same office.” *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38 (1st Cir.
9 1993); *see also Schulz v. Williams*, 44 F.3d 48, 52-53 (2d Cir. 1994) (affidavit satisfied
10 the competitive-injury test by stating that election rules “could siphon votes from the
11 Conservative Party line and therefore adversely affect the interests of the
12 Conservative Party”); *DNC v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018)
13 (Democratic Party had standing because the challenged laws affected voters “who tend
14 to vote disproportionately for Democratic candidates”), *rev’d and remanded sub nom.*
15 *on other grounds, Brnovich*, 141 S. Ct. 2321. Court have thus “uniformly rejected” the
16 argument that “the potential loss of an election” is “too remote, speculative and
17 unredressable to confer standing.” *Owen*, 640 F.2d at 1132.

18 Finally, the Secretary recasts these competitive injuries into vote-dilution
19 injuries. *See* Sec’y Mot. at 13-15. But the two injuries are distinct, as all of the
20 competitive-injury cases demonstrate. Indeed, *Cegavske* shows that this complaint
21 properly alleges a competitive electoral injury independent of any vote-dilution injury.
22 *Cegavske* recognized—as it must, under Ninth Circuit precedent—that “[c]ompetitive
23 standing’ can exist when a state action will lead to the ‘potential loss of an election.’”
24 *Cegavske*, 488 F. Supp. 3d at 1003 (quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th
25 Cir. 2011)). But the court declined to find competitive standing in that case only
26 because “[t]he pleadings ma[d]e no showing of ‘an unfair advantage in the election
27 process.’” *Id.* (quoting *Drake*, 664 F.3d at 783). These pleadings *do* make that showing.
28 Taking the competitive allegations as true, Plaintiffs “have the requisite concrete,

1 non-generalized harm to confer standing.” *Mecinas*, 30 F.4th at 898.

2 **C. Elections conducted in violation of federal law injure candidates**
 3 **and voters.**

4 Voters have standing, too. After all, the plaintiffs who successfully enforced the
 5 election-day statutes in *Foster v. Love* were “Louisiana voters” who sued “the State’s
 6 Governor and secretary of state,” challenging the state election rules “as a violation of
 7 federal law.” *Foster*, 522 U.S. at 70. That describes this case. Vote dilution is the most
 8 obvious form of injury suffered by voters when unlawful votes are counted. Courts
 9 recognize that “vote dilution can be a basis for standing.” *Wood v. Raffensperger*, 981
 10 F.3d 1307, 1314 (11th Cir. 2020). This most often occurs in “the racial gerrymandering
 11 and malapportionment contexts,” where one block of voters is “harmed compared to
 12 ‘irrationally favored’ voters from other districts.” *Id.* But Plaintiffs here, no less than
 13 redistricting plaintiffs, “are asserting ‘a plain, direct and adequate interest in
 14 maintaining the effectiveness of their votes,’ not merely a claim of ‘the right possessed
 15 by every citizen to require that the government be administered according to law.’”
 16 *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438
 17 (1939)); *cf. Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote can neither
 18 be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box
 19 stuffing.” (citations omitted)).

20 The Supreme Court has extended the “equal weight for equal votes” principle
 21 beyond redistricting. *Bush v. Gore*, 531 U.S. 98, 104 (2000). “Equal protection applies
 22 as well to the manner of [the] exercise” of the right to vote. *Id.* “Having once granted
 23 the right to vote on equal terms, the State may not, by later arbitrary and disparate
 24 treatment, value one person’s vote over that of another.” *Id.* at 104-05. And Plaintiffs
 25 here have alleged that the casting of invalid ballots would dilute their legally-cast
 26 votes. *Baker*, 369 U.S. at 208 (1962) (citing *Coleman*, 307 U.S. at 438). This Court has
 27 rejected vote dilution “due to ostensible election fraud.” *Paher v. Cegavske*, 457 F.
 28 Supp. 3d 919, 926 (D. Nev. 2020). But vote dilution injures voters in at least three

1 other ways that this Court has not considered.

2 **First**, the post-election deadline harms voters in particular by damaging the
 3 relative weight of their ballot. That is not an injury “common to all members of the
 4 public,” *Ex parte Levitt*, 302 U.S. 633, 636 (1937), or one that “all citizens share,”
 5 *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974). A Nevadan
 6 who didn’t vote in the last election or didn’t plan to vote in the upcoming election
 7 would not share that injury—they could not claim that *their vote* has been harmed.
 8 The “impairment resulted from dilution by a false tally” is an injury unique to the
 9 voters included in the tally for that specific election. *Baker*, 369 U.S. at 208. The
 10 mathematical “disadvantage” in the effectiveness of a vote that is the basis for
 11 standing in redistricting is the *same injury* that is the basis for standing here. *Id.* at
 12 206. That “disadvantage to [voters] as individuals,” however slight, is an injury in fact,
 13 *id.*, “even if [those] harms may be difficult to prove or measure,” *Spokeo*, 578 U.S. at
 14 341. And that the injury “is widely shared” by other voters does not mean that it “is
 15 abstract.” *Akins*, 524 U.S. at 24. If an injury were generalized merely because other
 16 voters shared it, no court could hear redistricting cases.

17 **Second**, the post-election deadline imposes different rules for mail-in ballots
 18 over in-person ballots. All in-person ballots must be received by election officials on
 19 election day. But mail-in ballots can continue to come in—and be counted—up to a
 20 week after election day. This has nothing to do with fraud. Ballots received after
 21 election day are necessarily invalid because they violate the federal “day for the
 22 election.” 2 U.S.C. §7; 3 U.S.C. §1. The Secretary disputes that conclusion, but “[f]or
 23 standing purposes, [courts] accept as valid the merits of [the plaintiff’s] legal claims.”
 24 *FEC v. Cruz*, 596 U.S. 289, 298 (2022). And “[i]f correct on the merits, as [the court]
 25 must assume for standing purposes, [Plaintiffs’] challenge presents a clearly
 26 redressable injury.” *Sierra Club v. EPA*, 699 F.3d 530, 533 (D.C. Cir. 2012); *see also*
 27 *Idaho Conservation League v. Bonneville Power Admin.*, 83 F.4th 1182, 1189 (9th Cir.
 28 2023) (“That petitioners’ theory may fail on the merits does not mean petitioners lack

standing to raise it.”).

Third, the post-election deadline favors Democrats over Republicans. Plaintiffs have detailed the partisan disadvantage above. *See supra* Section I.B. Laws that result in partisan disadvantage also injure voters by “dilut[ing] the vote of political groups.” *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) (reviewing law that “diluted the votes of Indiana Democrats”), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The Supreme Court has held that partisan redistricting is nonjusticiable on other grounds, but the Court has never questioned that “diluting the electoral strength of Democratic voters” is a legitimate Article III injury. *Rucho*, 139 S. Ct. at 2492. Partisan injury is a concrete injury to Republican voters represented by the RNC and NVGOP.

The cases dismissing vote-dilution allegations are not persuasive for several reasons. First, even courts that rejected vote-dilution standing did so because those plaintiffs “never describe[d] how their member voters will be harmed by vote dilution where other voters will not.” *Cegavske*, 488 F. Supp. 3d at 1000; *see also Wood*, 981 F.3d at 1315 (plaintiff conceded that “he is affected by Georgia’s alleged violations of the law in the same way as every other Georgia voter”); *Bognet v. Sec’y Commonwealth of Penn.*, 980 F.3d 336, 358 n.13 (3d Cir. 2020) (“[T]he Voter Plaintiffs have not alleged that their votes are less influential than any other vote....”), *judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). Even under the reasoning of those cases, Plaintiffs have standing. Second, the plaintiffs in those cases primarily relied on predictions of future voter fraud for their theory of injury, which courts held was too speculative. *E.g., Paher*, 457 F. Supp. 3d at 925; *Way*, 492 F. Supp. 3d at 374; *Feehan v. Wis. Elections Comm’n*, 506 F. Supp. 3d 596, 609 (E.D. Wis. 2020); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz. Dec. 9, 2020). But Plaintiffs’ dilution injuries do not depend on predictions of fraud. It’s the fact that *all* of those ballots are *late* under federal law that produces the injury. Third, more recent cases have recognized that plaintiffs who allege that “illegitimate votes dilute their own” vote

1 have standing because their injuries “have ‘a close relationship to a harm traditionally
2 recognized as providing a basis for a lawsuit in American courts.’” *Green v. Bell*, 2023
3 WL 2572210, at *4 (W.D.N.C. Mar. 20, 2023).

4 Well-established precedent shows that parties, candidates, and voters have
5 standing when their political effectiveness is diminished by the effects of a law. That
6 conclusion is hardly surprising. *Foster* was brought by voters, and the Supreme Court
7 has a long history of such cases. *E.g.*, *Foster*, 522 U.S. at 70; *Smiley v. Holm*, 285 U.S.
8 355, 361 (1932) (“citizen, elector and taxpayer”); *Wood v. Broom*, 287 U.S. 1, 4 (1932)
9 (“citizen of Mississippi, a qualified elector under its laws”). Moreover, “political parties
10 and candidates have standing to represent the rights of voters.” *Bay Cnty. Democratic*
11 *Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (collecting cases). Parties,
12 candidates, and voters are those most affected by election rules. All have standing.

13 **III. Plaintiffs have plausibly stated a claim that counting ballots received**
14 **after election day violates federal law.**

15 Congress has the final say over the timing of federal elections. The Elections
16 Clause gives States initial authority to determine the “Times, Places and Manner of
17 holding Elections for Senators and Representatives.” U.S. Const. art. I, §4. Where
18 Congress has not acted, the clause “imposes the duty” on state legislatures to regulate
19 congressional elections. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8
20 (2013). But “Congress may at any time by Law make or alter such Regulations.” U.S.
21 Const. art. I, §4. Through this superintendent power, Congress can “preempt state
22 legislative choices” over the conduct of congressional elections. *Foster*, 522 U.S. at 69.

23 Congress also has the final say over the timing of presidential elections. The
24 Electors Clause vests in “Congress” the power to “determine the Time of chusing the
25 Electors” for the offices of President and Vice President. U.S. Const. art. II, §1. State
26 legislatures have power only to “appoint” presidential electors “in such Manner” as
27 they choose. *Id.* The Elections Clause and the Electors Clause are “counterpart[s]”
28 that give Congress authority over the timing of federal elections. *Foster*, 522 U.S. at

69. And when Congress speaks on the timing of federal elections, it “*necessarily* displaces some element of a pre-existing legal regime erected by the States.” *Inter Tribal Council*, 570 U.S. at 15 & n.6.

Exercising these two constitutional powers, Congress has established a uniform federal election day. For members of the House of Representatives, “the day for the election” is the “Tuesday next after the 1st Monday in November” in “every even numbered year.” 2 U.S.C. §7. Senatorial elections occur at the same time, and Senators are elected “[a]t the regular election held in any State next preceding the expiration of the term for which any Senator was elected.” *Id.* §1. Likewise, “[t]he electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.” 3 U.S.C. §1. This trio of statutes “mandates holding all elections for Congress and the Presidency on a single day throughout the Union.” *Foster*, 522 U.S. at 70.

A. The consummation of the election—casting and receiving ballots—must end on election day.

“The day for the election” means the final day ballots are received by election officials. In its simplest form, the act of electing requires actions by two parties: a citizen casting the vote, and a state official receiving the vote. These two actions comprise the “election.” A voter’s desire to elect a particular candidate is ineffective until an election official receives the vote. For this reason, “voting necessarily requires some effort and compliance with some rules.” *Brnovich*, 141 S. Ct. at 2338. Among other things, those rules ensure that ballots are received by election officials on time. And until the proper state official receives the vote, the voter has not “elected” anybody, and an “election” has not occurred. These intuitive rules flow from the plain meaning of the election-day statutes.

The Supreme Court understands these statutes the same way. “When the federal statutes speak of ‘the election’ of a Senator or Representative, they plainly refer to the *combined actions* of voters and officials meant to make a final selection of

1 an officeholder....” *Foster*, 522 U.S. at 71 (emphasis added). That is, the “final
 2 selection” requires the “combined actions” of voters and election officials. A “final
 3 selection” does not occur when the voter merely marks the ballot or delivers the ballot
 4 to the post office because those events do not involve an election official. Only once the
 5 ballot is in the custody of an election official has the “final selection” occurred. In
 6 *Foster*, the Supreme Court confronted Louisiana’s “open primary” statute, which
 7 provided an opportunity to fill federal offices during the month before election day,
 8 without any action to be taken on election day itself. *Id.* at 69-70. The Supreme Court
 9 held that closing the election before election day violates the statutes “establishing a
 10 particular day as ‘the day’ on which these actions must take place, ... a matter on
 11 which the Constitution explicitly gives Congress the final say.” *Id.* at 71-72. And when
 12 the two acts of election—casting and receiving ballots—are “concluded as a matter of
 13 law before the federal election day,” the system violates the federal election-day
 14 statutes. *Id.* at 72. By the same logic, extending either of those two acts *beyond* election
 15 day likewise violates those statutes.

16 In other words, the election must be “consummated” on election day. *Id.* at 72
 17 n.4. Because consummation of the election requires the “combined actions of voters
 18 and officials,” *id.* at 71, a ballot is cast not when it is marked, but only when it is
 19 actually deposited “in the custody of election officials,” *Maddox v. Bd. of State*
 20 *Canvassers*, 149 P.2d 112, 115 (Mont. 1944). “[V]oting is done not merely by marking
 21 the ballot but by having it delivered to the election officials and deposited in the ballot
 22 box before the closing of the polls on election day.” *Id.* And just as the election “may
 23 not be consummated prior to federal election day,” neither may it be “consummated”
 24 *after* election day. *Foster*, 522 U.S. at 72 n.4. After election day, election officials go
 25 about various duties: counting ballots, disqualifying voters, hearing challenges, and
 26 certifying the election. These actions don’t implicate the election-day statutes because
 27 they are not acts of consummation—they are not the “final selection” resulting from
 28 the “combined actions” of voters and election officials. *Id.* at 72. Election day is thus

1 the final day for voters to vote *and* for election officials to receive those votes.

2 When Congress says, “the day for the election,” 2 U.S.C. §7, Congress “says in
3 [the] statute what it means and means in [the] statute what it says,” *Conn. Nat. Bank*
4 *v. Germain*, 503 U.S. 249, 253-54 (1992). Other provisions of the election-day statutory
5 scheme confirm this plain reading. Having established a single national election day,
6 Congress carved out exceptions to the rule. “Title 2 U.S.C. §8, which was enacted along
7 with §7, provides that a State may hold a congressional election on a day other than
8 the uniform federal election day,” but only in narrow circumstances. *Foster*, 522 U.S.
9 at 72 n.3. First, when a “vacancy is caused by a failure to elect at the time prescribed
10 by law,” States can hold runoff elections after the uniform federal election day. 2
11 U.S.C. §8(a). Second, when the vacancy is caused “by the death, resignation, or
12 incapacity of a person elected,” States can hold special elections to fill the vacancy. *Id.*;
13 *see also Pub. Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D. Ga.) (holding that
14 Georgia’s statute mandating a runoff in the event that no candidate achieves a
15 majority vote does not violate 2 U.S.C. §8), *aff’d*, 992 F.2d 1548 (11th Cir. 1993).

16 These exceptions prove the scope of the election-day rule. Congress didn’t need
17 to carve out exceptions for post-election acts such as counting ballots or certifying
18 results because those acts occur *after* the election has been consummated between the
19 voter and election official. But runoffs and vacancies renew the opportunity for
20 consummation by allowing election officials to receive additional ballots, which is why
21 “section 8 creates an exception to section 7’s absolute rule in [that] limited class of
22 cases.” *Busbee v. Smith*, 549 F. Supp. 494, 526 (D.D.C. 1982), *aff’d*, 459 U.S. 1166
23 (1983).

24 Congress also carved out exceptions for certain absentee voters in special
25 elections. “[I]n the case of an individual who is an absent uniformed services voter or
26 an overseas voter” States “shall accept” their ballots “so long as the ballot ... is received
27 by the appropriate State election official not later than 45 days after the State
28 transmits the ballot or other material to the voter.” 2 U.S.C. §8(b)(5)(B). In that

1 circumstance, Congress requires absentee ballots to be counted even if received after
2 the date of the special election. That exception proves that Congress can prescribe
3 exceptions for the receipt of absentee ballots when it wants to—and it has done so only
4 for a specific class of voters in narrow circumstances. It also demonstrates that
5 Congress understands the consummation of an “election” as the *receipt* of the ballots
6 by election officials. Outside those exceptions, state statutes must “respect[] section
7 7’s formula for determining the date for general elections,” and may not “circumvent
8 holding an authentic general election on that date.” *Pub. Citizen*, 813 F. Supp. at 830.

9 **B. The Secretary’s counterarguments don’t rebut *Foster*.**

10 The Secretary points to a handful of administrative acts that only underscore
11 that “the day” for the election is the final day ballots are received by election officials.
12 The Secretary points out that the election-day statutes permit early voting and
13 counting ballots after the election. Sec’y Mot. 16-17. But neither of those
14 administrative acts are the “combined actions of voters and officials meant to make a
15 final selection of an officeholder.” *Foster*, 522 U.S. at 74. States have always canvassed
16 votes, conducted recounts, heard election challenges, and announced results days or
17 weeks after election day. None of those administrative acts involves the casting of
18 ballots. And when voters *do* have to cast ballots after election day—in runoffs and
19 vacancies—Congress carved out explicit exceptions. *See* 2 U.S.C. §8(a) (permitting
20 States to conduct elections when a “vacancy is caused by a failure to elect at the time
21 prescribed by law” or “by the death, resignation, or incapacity of a person elected”).
22 Unlike administrative acts such as counting ballots and certifying results, runoffs and
23 vacancies renew the opportunity for consummation by allowing election officials to
24 receive additional ballots. That is why Congress had to “create[] an exception to
25 section 7’s absolute rule in [that] limited class of cases.” *Busbee*, 549 F. Supp. at 526.

26 The Secretary next argues that the election-day statutes “are silent” about
27 when ballots may be received. Sec’y Mot. 17-18. But that just avoids interpreting the
28 meaning of “the day for the election,” 2 U.S.C. §7, which “*necessarily* displace[]” state

1 law, *Inter Tribal Council*, 570 U.S. at 15 & n.6. The election-day statutes say nothing
 2 about open primaries, but that didn't deter the Supreme Court from its duty to
 3 interpret the law in *Foster*. The Secretary implies that the Supreme Court *should have*
 4 held in *Foster* that the election-day statutes are silent about open primaries, and
 5 dismissed the case. But *Foster* is binding law, and it provides important holdings on
 6 the meaning of an "election" and what it means to "consummate" an election outside
 7 of election day. *Foster*, 522 U.S. at 74.

8 Finally, the Secretary argues that the Uniformed Overseas Citizens Absentee
 9 Voting Act (UOCAVA) permits counting ballots received after election day. *See* Mot.
 10 18-19. That is false. Other courts have erroneously relied on UOCAVA to conclude
 11 that Congress "allow[s] ballots received after Election Day to be counted." *Bost v. Ill.*
 12 *State Bd. of Elections*, 684 F. Supp. 3d 720, 737 (N.D. Ill. 2023). UOCAVA merely
 13 requires overseas voters to mail in their ballots in compliance with the law of the State
 14 in which they're voting. 52 U.S.C. §20304(b)(1). It doesn't adopt, incorporate, or
 15 approve of those deadlines—it just declines to set a deadline itself. And it did so in
 16 1986, long before most States adopted their post-election mail-in deadlines. UOCAVA
 17 also requires States to send ballots to overseas voters "not later than 45 days before
 18 the election." 52 U.S.C. §20302(a)(8)(A). In rare circumstances, States miss that
 19 deadline. When that happens, the Justice Department has obtained court-ordered
 20 extensions to the receipt deadline as an *equitable remedy* for the State's violation of
 21 UOCAVA. *E.g., United States v. West Virginia*, 2014 WL 7338867 (S.D. W. Va. Dec.
 22 22, 2014). That judicial practice says nothing about the meaning of the election-day
 23 statutes. UOCAVA does not extend the deadline for the receipt of ballots.

24 Even if UOCAVA did permit post-election receipt, that would be an exception
 25 to the election-day rule. Where Congress has not acted, States have authority to
 26 determine the "Times, Places and Manner of holding Elections for Senators and
 27 Representatives." U.S. Const. art. I, §4. But "Congress may at any time by Law make
 28 or alter such Regulations." *Id.* Congress could permit an exception for some ballots if

1 it wanted to. In fact, it has considered and rejected such proposals. *See Keisling*, 259
 2 F.3d at 1171-74 (detailing the legislative history of the election-day statute).
 3 Regardless, even if Congress had carved out an exception for overseas ballots, it would
 4 not mean it had carved out an exception for all ballots in Nevada.

5 **C. Defendants’ violation of federal law violates Plaintiffs’ rights.**

6 This is not an *Anderson-Burdick* case. The Secretary argues that the Court
 7 should apply the *Anderson-Burdick* balancing test, but that makes no sense—the test
 8 applies only to claims that a law “unfairly or unnecessarily burdens” the right to vote.
 9 *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). That is, voters have a unique cause
 10 of action to challenge otherwise valid laws that “impermissibly burden the right to
 11 vote.” *Burdick v. Takushi*, 504 U.S. 428, 430 (1992). Under those undue-burden
 12 claims, “a court ‘must weigh the character and magnitude of the asserted injury’ to
 13 voting rights ‘against the precise interests put forward by the State as justifications
 14 for the burden imposed by its rule.’” *Tex. League of United Latin Am. Citizens*, 978
 15 F.3d at 143 (citation omitted). Plaintiffs’ claim is not that the Nevada law “burdens”
 16 their right to vote and stand for office, but that it *violates* those rights because it
 17 violates federal law. The violation of Plaintiffs’ rights depends entirely on whether
 18 Nevada’s ballot-receipt deadline conflicts with federal law.

19 The Court need look no further than *Foster* to see that elections conducted in
 20 violation of federal law violate the rights of candidates and voters. Plaintiffs here, just
 21 like the plaintiffs in *Foster*, seek “declaratory and injunctive relief ... under 42 U.S.C.
 22 §1983.” *Love v. Foster*, 90 F.3d 1026, 1028 (5th Cir. 1996), *aff’d*, 522 U.S. 67; *see also*
 23 *Keisling*, 259 F.3d at 1170 & n.2 (same); *Voting Integrity Project, Inc. v. Bomer*, 199
 24 F.3d 773, 774 (5th Cir. 2000) (same); *Millsaps v. Thompson*, 259 F.3d 535, 542 (6th
 25 Cir. 2001) (same). The Supreme Court in *Foster* did not apply the *Anderson-Burdick*
 26 test. It did not analyze whether Louisiana’s open-primary statute imposed a burden
 27 on voters or made “voting and receiving votes easier.” Sec’y Mot. 20. Neither did the
 28 Ninth Circuit in *Keisling*. The question in all election-day cases is simply whether the

1 state statute conflicts with federal law. If it does, relief for voters and candidates is
2 appropriate under 42 U.S.C. §1983.

3 In any event, this Court has the inherent power to review and enjoin violations
4 of federal law by state officials. *Ex parte Young*, 209 U.S. 123 (1908). The Secretary
5 makes no argument that Plaintiffs lack a claim under the *Ex parte Young* cause of
6 action, or that the named Defendants are not responsible for enforcing the ballot-
7 receipt deadline. *See* Compl. ¶¶62-71.

8 **IV. Plaintiffs’ complaint for prospective relief is not barred by laches.**

9 Plaintiffs seek forward-looking injunctive relief, and they are harmed each
10 election cycle by the post-election deadline. Laches thus does not apply. *Danjaq LLC*
11 *v. Sony Corp.*, 263 F.3d 942, 959 (9th Cir. 2001) (“A prospective injunction is entered
12 only on the basis of current, ongoing conduct that threatens future harm. Inherently,
13 such conduct cannot be so remote in time as to justify the application of the doctrine
14 of laches.” (citation omitted)). The Secretary cites *Danjaq* but overlooks the rule that
15 “laches typically does not bar prospective injunctive relief.” *Id.* *Danjaq* discusses a
16 limited exception “in the trademark context” that applies when “the feared future
17 infringements are subject to the same prejudice that bars retrospective relief.” *Id.* The
18 Secretary does not argue that this or any other exception applies. Even if he did, this
19 is not a trademark case. And even if it were, Plaintiffs do not seek retrospective relief.
20 Thus, “the general rule that laches does not bar future injunctive relief” applies. *Id.*

21 The Secretary’s only other case proves these principles remain true “in the
22 election context.” Sec’y Mot. 21 (citing *Soules v. Kauaians for Nukolii Campaign*
23 *Committee*, 849 F.2d 1176 (9th Cir. 1988)). In *Soules*, the plaintiffs sought
24 retrospective relief to *overturn* a special election. 849 F.2d at 1180. The Secretary cites
25 no election case seeking *prospective* relief based on ongoing and future harms. And
26 whether the Court should enter judgment in Plaintiffs’ favor before the 2024 general
27 election is irrelevant at the pleading stage. *See* Sec’y Mot. 22-23.

CONCLUSION

The Court should deny the motion to dismiss.

Dated: June 14, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

This filing was served on all appearing parties on the 13th day of June 2024 by electronic service by way of the Court's ECF System.

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/s/ Jeffrey F. Barr
An employee of Ashcraft & Barr LLP